United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2275

B
Pgs
6

ORIGINAL

To be argued by
DANIEL RIESEL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA ex rel. JEFFREY FOSTER,

Petitioner-Appellant,

- against -

JAMES R. SCHLESINGER, Secretary of Defense, JOHN W. WARNER, Secretary of the Navy, and ADMIRAL JOHN N. SHAFFER, Commandant, Third Naval District, New York,

Respondents-Appellees.

REPLY BRIEF FOR PETITIONER-APPELLANT

DANIEL RIESEL
Attorney for Petitioner-Appellant
425 Park Avenue
New York, New York 10022
421-2150

(7859) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850
New York, N. Y. (212) 565-6377
Philadelphia, Pa. (215) 563-5587
Washington, D. C. (202) 783-7288

3

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term 1974

Docket No. 74-2275

Calendar No. 623

UNITED STATES OF AMERICA ex rel.
JEFFREY FOSTER,

Petitioner-Appellant.

-against-

JAMES R. SCHLESINGER, Secretary of Defense,
JOHN W. WARNER, Secretary of the Navy,
and ADMIRAL JOHN N. SHAFFER, Commandant,
Third Naval District, New York,

Respondents-Appellees.

REPLY BRIEF OF PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This reply brief is primarily directed to the Navy's confusion between Dr. Foster's general objection to war or violence and a "sincere objection to participation in war in any form".

This reply brief also is directed to several of the more egregious distortions of the record found in the Navy's brief.

ARGUMENT

THERE IS NO BASIS IN FACT SUGGESTING THAT DR. FOSTER MAINTAINED AN OBJECTION TO PARTICIPATION IN WAR PRIOR TO 1966.

The Chief of Naval Personnel's 1973 decision to deny Dr. Foster's application is based on a conclusion that he was "opposed to war and killing" prior to entry into inactive duty in 1966. (95a)* General views as to war, killing or violence do not amount to the Regulation's requirement of "a firm, fixed and sincere objection to participation in war in any form...." 32 C.F.R. § 730.18(a). Apparently, the Chief of Naval Personnel failed to comprehend that a dislike of war and violence does not imply that an individual will refuse to participate in war when he is called upon to do so by his country.

Although the confusion between general views and a refusal to participate in war has been carried over to appellees'

---

* The Navy also concluded that there was nothing in the record to indicate that Dr. Foster's "present beliefs are in substance and foundation any different" than those held before he accepted his Commission. (95a) This conclusion underlies the questionable quality of the decision as it is difficult to believe that Foster's beliefs had not modified "in substance and foundation" during his completion of post-graduate work, medical school, internship and residency.

brief (e.g. at pages 10-11), the Navy has taken some liberty with the record to conjure up evidence of an objection to participation as they begrudgingly concede "that prior general beliefs and views as to war and violence are [not] grounds to deny a conscientious objection application." (Appellant's brief, footnote at page 21.)

(a) Minimal Naval Contact Until 1973.

The Navy's initial effort on this appeal is an attempt to create an impression of Dr. Foster's long and deep involvement with the Naval Service. In fact, Dr. Foster's relation with the service was "minimal" until the summer of 1973 (93a - 94a). His principal connection with the Navy was limited to the annual routine of filling out certain single page questionnaires (98a - 99a, 101a, 103a - 105a).* This is hardly the type of activity that would force a medical student or young doctor to consider his ultimate military obligation as the Government contends. However, on or about August 3, 1973, Dr. Foster received a certified letter

---

* The last questionnaire filled out by Dr. Foster was completed on September 16, 1972 (98a).
The Navy misrepresents Dr. Foster's statement in his application for discharge at page 3 of its brief. Dr. Foster stated, "that during all my residency years I had never been asked to submit any such request form . . . ." (36a) The Government attempts to contradict Dr. Foster by referring to the only deferment form which was submitted prior to Dr. Foster's entry into his residency in February, 1971, as accurately stated by Dr. Foster (97a).

from Captain Trone, threatening him with being called "to immediate active service". (23a) Captain Trone's letter did force Dr. Foster to evaluate his ultimate military obligation, and combined with Dr. Foster's treatment of a dying young patient, caused him to submit his resignation.

(b) No Evidence of Objection to Participation in War.

On this appeal the Navy's major effort to find evidence of an early objection to participation in war is to ransack Dr. Markowitz's testimony. In so doing, the appellees conveniently overlook the fact that Dr. Markowitz, in writing and subsequent testimony, specifically fixes the summer of 1973 as the time of crystallization. (49a, 71a - 73a, 76a)*

Initially, the Government seizes on the testimony that Dr. Foster expressed dismay over the war in Vietnam. It is sufficient to note that so did millions of other Americans and that such particularized objection to the existence of that war has little to do with conscientious objection to participation in any and all wars.

The Government then relies on Dr. Markowitz's statement:

> "[W]hen he first heard he had to go into the Navy, he used a device

---

* This date is confirmed by the supporting letters. The letter of Rosemarie Foster is conclusive and specific with respect to the time of crystallization.

called denial . . . and simply mentioned . . . there was no problem, he was supposed to go into the Navy, but there was some alternative. . . ." (63a)

The Navy, without a scintilla of fact or logic, concludes that this passage referred to events in 1966 and then implies that the "alternative" was to subsequently submit a claim of conscientious objection.*

The actual time period referred to by Dr. Markowitz was at the expiration of the Ensign 1915 deferment in 1971 as opposed to 1966. The "alternative" cryptically referred to was simply that of the possible further deferment provided by the Berry Plan. The Government's distortion can be readily detected when we note that Dr. Markowitz testified ". . . when he first heard he had to go into the Navy . . . ." (Emphasis supplied.) Dr. Foster volunteered for the Navy in 1966. The only point when Dr. Foster had to go on active Naval duty was either at the end of his Ensign 1915 deferment in 1971, or at the end of his Berry Plan deferment in 1974.

Thus, Dr. Foster was not under any compulsion to go into the Navy prior to 1966. Indeed, he was not faced with any immediate prospect for compulsive military service in 1966.

---

* Footnote at page 13 of appellees' brief.

During the next five years as a member of the inactive reserve, Dr. Foster had little contact with the Navy. However, in 1971, he was faced with expiration of his deferment and only at that point was he forced to consider active duty in the Navy. As his thoughts, although developing, had not crystallized, he opted for another "alternative", the Berry Plan.

The Government turns to further distortion of Dr. Markowitz's testimony when it claims that "the most telling evidence of early crystallization . . . is the view expressed by Dr. Markowitz that Lt. Foster could never have served in the armed forces. (76a)" (Appellees' brief at page 21.) To place this assertion in proper context, we must examine the question asked of Dr. Markowitz:

> "Have you noticed anything in the recent period, which I will refer to as the last year, which has made it impossible for him to serve in the armed forces?" (Emphasis supplied.) 75a - 76a.

Dr. Markowitz responded as follows:

> ". . . I have the feeling he never could have served in the armed forces at the time." 76a.

Thus, it is quite clear that Dr. Markowitz was responding to a question limited to the "recent period" of the preceding year (May, 1973 through May, 1974) and not to any of the other

years of his acquaintance with Dr. Foster.* A similar distortion is attempted by the Navy in its apparent reliance on the remainder of Dr. Markowitz's answer** to the effect that Dr. Markowitz had "the feeling that any time he [Dr. Foster] would have been presented with this situation, something like this would have happened". Dr. Markowitz uses the term "this situation" on two occasions (72a) and is clearly referring to the facts that caused crystallization in the summer of 1973.

We submit that the meagreness of the Government's case is illustrated by its characterization of this aspect of Dr. Markowitz's testimony as being "the most telling evidence of early crystallization".

Another attempt to show an early objection to participation in war is the Navy's reliance on the alleged contents of a lecture delivered in 1966 by George Wald, a Harvard professor. The Navy contends that Wald's "anti-war beliefs corresponded with and reinforced positions then held by Lt. Foster". (Appellees' brief at page 15.) Dr. Foster did refer to a newspaper clipping reporting Wald's lecture to illustrate that his moral beliefs

---

* Moreover, the probative value of this aspect of Dr. Markowitz's testimony is further reduced as Dr. Markowitz is essentially surmising on how his patient would react when faced with active duty.

** Quoted at appellees' brief at page 16.

were not as unusual as the Navy Chaplain had reported (83a). However, Wald's views with respect to war, whatever they may be, do not appear anywhere in the record or in the article.* Dr. Foster's intent in referring to the Wald article was merely to show that other individuals had reached similar conclusions with respect to man's biological evolution. Dr. Foster did not ascribe any anti-war beliefs to Wald and neither did Dr. Markowitz (73a). Thus to assert that Wald's "anti-war beliefs corresponded with and reinforced positions then held by Lt. Foster" is simply a disingenuous attempt to rewrite the record.

The foregoing not only demonstrates an absence of a basis in fact but also shows that the appellees have actually abandoned the Chief of Naval Personnel's reason for denying Dr. Foster's application, and have rummaged through the record for evidence of a refusal to participate. The reason for the original denial was that Dr. Markowitz had testified that Foster was opposed to war and killing prior to enrollment. Now, the Government attempts to ignore that reason and seeks to find evidence to show that Foster not only had this philosophical objection, but could not participate in war.

---

* The newspaper article reporting the Wald lecture was offered but not made part of the administrative record but according to the record appeared in the New York Times on March 8, 1966.

Moreover, the Government on this appeal appears to abandon not only the Chief of Naval Personnel's reasoning, but also Judge Duffy's reasoning that Foster was not sincere, a judicial finding contrary to the Navy's finding. The Navy decision denying Dr. Foster's application must stand or fall on the reason given by the Chief of Naval Personnel, and neither the District Court nor the Navy's lawyers can substitute new reasons for the denial. United States ex rel. Checkman v. Laird, 469 F.2d 773, 780, 782 (2d Cir. 1971). If the original reason is deemed to be adequate as a matter of law, it can not be sustained by rummaging through the record to lift out of context isolated bits of evidence. United States ex rel. Checkman v. Laird, supra at 783.

The appellant contends that the District Court not only substituted a new reason for the denial but improperly relied on fragmentary and inconclusive facts to sustain that denial.*

(c) Nurnberg Does Not Control

Despite the appellees' apparent shift, they persist in contending that Nurnberg v. Froehlke, 489 F.2d 843 (2d cir.

---

* Appellant's principal brief at pages 50-51.

1973) is dispositive of this appeal. Although Judge Duffy did rule that Nurnberg v. Froehlke was controlling, the facts in this case are strikingly different. Thus, the Investigating Officer in Nurnberg specifically concluded that the applicant was not sincere in his beliefs. Nurnberg at 845. The Hearing Officer found that whatever Nurnberg's beliefs were, they had crystallized long before entry into the Army. In the case at bar, the Hearing Officer specifically found that Dr. Foster was sincere and although no finding as to the time of crystallization was specified, it is apparent that crystallization was accepted to have occurred after enrollment in the service.

Dr. Nurnberg was brought up in the Jewish faith and his conscientious objection beliefs were based on the ethics and morals of the Jewish religion. Nurnberg, 844-845. Whatever early religious training Dr. Foster had did not have anything to do with his beliefs of conscientious objection as such beliefs were worked out in the later years of his postgraduate and medical education. These beliefs were never characterized as having a religious content or basis.

Dr. Nurnberg's father and grandfather were conscientious objectors, and Nurnberg had been influenced by their beliefs and had been taught to stand up for such beliefs. Nurnberg, 846. Dr. Foster has no such family history or background.

Dr. Nurnberg and his family escaped from Nazi Germany after living in fear and terror of Gestapo apprehension. He suffered nightmares, depressions and anxiety during his childhood and again when he contemplated enrolling in the Reserve. Nurnberg, 844, 846. Dr. Foster had no such emotions prior to enrolling in the Ensign 1915 Program.

Dr. Nurnberg engaged in anti-war activities prior to his enrollment in 1968. Nurnberg, 846. In contrast, Dr. Foster engaged in similar activities at approximately the same time, but significantly these activities occurred two and a half years after the had enlisted in the Ensign 1915 Program.

Dr. Nurnberg stated that he had achieved intellectual realization of his feelings, "which became concrete" during his college days. Nurnberg, 846. Dr. Foster testified that he began to work out his philosophy after college, and his thoughts developed throughout his medical education.

Dr. Nurnberg supplied letters stating that he could never have served in the military. Nurnberg, 846. Dr. Foster's letters indicated a realization of his inability to serve in the summer of 1973.

Dr. Nurnberg had the unrealistic hope prior to and upon enlisting in the Berry Plan that he might not be called. In contrast, Dr. Foster never harbored or expressed such hope. Indeed, Dr. Foster submitted his application for discharge a

year prior to the expiration of his deferment, at the time that his thoughts crystallized, according to Dr. Markowitz.

Dr. Foster's enrollment in the Reserve came shortly after completion of college and many years before actual military service became imminent. On the other hand, Dr. Nurnberg enlisted in the Berry Plan and could anticipate the reality of active military service in the near future. Dr. Foster's beliefs had seven years to grow and mature, while Dr. Nurnberg submitted his application two and a half years after enrollment.

Judge Mulligan observed that there were no precipitating events in Nurnberg. In the instant case there are precipitating events in the summer of 1973, which have been extensively documented by Dr. Foster.

Finally, in Nurnberg the Army had in addition to the denial by the Hearing Officer, the recommendation of denial by Dr. Nurnberg's Commanding Officer, which was relied upon by the Army Board. In contrast, the Chief of Naval Personnel did not have the benefit of the recommendation of Dr. Foster's Commanding Officer.

The Navy and the District Court emphasize the supposed factual similarity between Nurnberg and Foster. If the facts were similar, then Nurnberg might be authority for upholding the Chief of Naval Personnel's decision, as Judge Mulligan specifically relied on the facts of record in ruling that Dr. Nurnberg

was not entitled to overturn the decision of the Army. However, the foregoing demonstrates, beyond peradventure, that the facts in these two cases are markedly different. Accordingly, the real value of Nurnberg is that it demonstrates the absence of any evidence to indicate that Dr. Foster had a firm, fixed objection to participate in war at the time of his enrollment, eight years ago.

(d) The Navy's Procedural Errors.

The Government dismissed the appellant's second argument on the theory that Dr. Foster did not suffer any prejudice because of his Commanding Officer's failure to follow Navy regulations. Thus, the Government facilely argues that the only purpose of the Commander's action is to provide the recommendation of an officer who personally knew the applicant. There is no support for this position in the Naval regulations or the record. The Government's argument overlooks the fact that if the Commanding Officer had done his job, he might have sent the record back to Commander Sweeney, the Hearing Officer, for a specific finding with respect to crystallization. We have contended that Commander Sweeney found that crystallization occurred in the summer of 1973, and would have made his finding specific with respect to late crystallization.

Turning to the Government's handling of the appellant's third argument, we find the Government claiming: "[A]t no stage of these proceedings did an inquiry focus on the nature of Lt. Foster's beliefs." (Appellees' brief at page 27.)

The entire purpose of the Navy's conscientious objector adjudication process was to ascertain the nature of Dr. Foster's beliefs. That is one of the requirements for discharge and specifically one of the reasons why Dr. Foster was interviewed by a Naval Chaplain. If the Government is now stating that the Navy really did not make an inquiry as to the nature of his beliefs, then there certainly is no basis for the Navy's denial of his application.

The Navy also argues that there is no support for the contention that ethical and moral beliefs were accepted only after the decision in Welsh v. United States, 398 U.S. 333 (1970). However, Mr. Justice Harlan found "at the time of Welsh's induction notice and prosecution the Selective Service was, as required by statute, exempting individuals whose beliefs were identical in all respects to those held by petitioner except that they derived from a religious source." Welsh, 398 U.S. at 361. Welsh was sentenced on June 1, 1966. Welsh, 398 U.S. at 333. Foster enrolled in the Ensign 1915 Program in February 1966. Accordingly, his beliefs, assuming they had not changed over the years, would not have qualified him as a

conscientious objector at that time.

(e) Dr. Foster's Conscientious Objection.

The appellees have attempted to create an issue by questioning Dr. Foster's failure to explain why he enrolled in the Ensign 1915 Program in 1966.* Indeed, they suggest that a fatal error in the appellant's appeal is his failure to specifically deny that his views crystallized prior to 1966.

The short answer to this argument is that Foster was not a conscientious objector in 1966. If he was, he would not have enrolled. Motivation for enrollment has been succinctly described by Judge Larkins in Aron v. Laird.**

> "The United States is a militarily oriented society. Each physician has been subject to the draft upon completion of medical school unless he is in some reserve plan. A young doctor desiring to specialize must enroll in such a plan so that his entry will be deferred until his specialization is completed." Aron, 358 F.Supp. 1175.

Dr. Foster's lengthy and detailed application carefully explains how his general philosophy grew and developed throughout his medical education. In 1966, when faced with the decision

---

* Appellees' brief at pages 14, 16 and 19.

** 358 F.Supp. 1170 (E.D.N.C. 1973), aff'd without opinion 487 F.2d 1397 (4th Cir. 1973).

of enrolling in the Reserve, he was seven years away from the events that led to the submission of his application for discharge. During these seven years, Foster not only completed his professional education, but was exposed to death, disease and trauma. During the same period the horrors of war were brought home to many by this country's long military involvement in Southeast Asia. It would be surprising if Foster's beliefs failed to undergo change and growth during this extensive period. Of course, the doctrine of crystallization is based on the concept that such subsequent events will eventually lead men to conclude that their conscience directs them not to participate in war.

CONCLUSION

The decision of the District Court should be reversed and the writ should issue.

Dated: New York, New York
February 5, 1975

Respectfully submitted,

DANIEL RIESEL
Attorney for Respondent-Appellant
Office and P.O. Address
425 Park Avenue
New York, New York 10022
Tel. No. (212) 421-2150

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

United States Court of Appeals / Second Circuit
Index No.

U.S.A.,
Petitioner-Appellant,
- against -
Schlesinger, et al,
Respondents-Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF ss.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York
That on the 5th day of February 1975 at Foley Square, N.Y.C. deponent served the annexed Reply Brief upon Paul Curran the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me, this 5
day of February 1975

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975